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ABSTRACT

In the United States Supreme Court's only decision on the question of journalists' protecting their confidential sources (the "Branzburg trilogy" of cases decided in 1972), Justice Lewis Powell emphasized the importance of "striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Justice Powell thus summarized the ad hoc balancing theory of the First Amendment: When the First Amendment comes into conflict with another constitutional right, the two rights must be weighed and a decision made as to which takes priority. In the Branzburg trilogy, First Amendment rights were found to be outweighed by the Sixth Amendment right to compel testimony. Since the time of the Branzburg trilogy the pendulum of court decisions has swung back and forth between First Amendment protections and Fifth, Sixth, and Fourteenth Amendment rights. But many recent antipress decisions have caused journalists to become alarmed about the apparently eroding status of their First Amendment protections, leading many to seek some sort of privilege for themselves. Considering the merits and deficiencies of state-enacted shield laws and a proposed federal shield law, it appears that the inherent risks of these measures mitigate for having the journalists take their chances via the ad hoc balancing theory. (RI)

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AD HOC BALANCING THEORY AND THE JOURNALIST'S PRIVILEGE: HOW HEAVY IS THE FIRST AMENDMENT?

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With the coverage of the Vietnam War and the protests against it, closely followed by the Watergate revelations which toppled the highest levels of the government of the United States, public awareness of the power of the press in this country was at its zenith in the early 1970s.

While these events exemplify the First Amendment's provision that a free press is a basic strength of a free people, criticism has come from widely differing quarters--from the average citizen to the Supreme Court, from local law enforcement officials to erudite attorneys and even from journalists themselves--that the press has perhaps gained too much power and has become arrogant and self-serving, especially in its quest for an absolute shield law immunizing journalists against revealing confidential sources and information.

Former Vice President Spiro Agnew's crude attacks on the press brought resounding cheers from the nation's "silent majority," who squealed with delight when he referred to the leaders of the broadcasting and newspaper industries as "effete, intellectual snobs." A national poll conducted by CBS in 1970 showed that 55 percent of those questioned favored peacetime restrictions on the press by the government if it thought the information was harmful to the national interest.[1]

Lewis H. Lapham, former reporter for the San Francisco Examiner and the New York Herald Tribune and currently editor of Harper's, wrote that it was a "myth that the press is only interested in the 'people's right to know,'" and that many journalists are so insecure about their professional status that they become arrogant and self-serving in their demands for privileges within the community.[2]

In an interesting twist of timing, less than two weeks after the Watergate break-in--an event which precipitated a national obsession with the inner workings of the press--the Supreme Court handed down its decision in the trilogy of cases, Branzburg v. Hayes,[3] United States v. Caldwell,[4] and In re Pappas,[5] (hereinafter this trilogy of cases will be referred to as "Branzburg"), in which it ruled for the first time on the First Amendment protection of journalists against testifying about their confidential sources of information.

In its 5-4 decision, the Court ruled that a reporter who witnessed criminal conduct must testify before a legitimately convened grand jury about what he saw just as any other citizen must do.[6] Of equal importance in that decision were suggested guidelines for determining when a journalist should be required to testify and when he could be excused.[7]

Justice Lewis Powell, in his concurring opinion in the Branzburg case, emphasized the importance of "striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[8]

With this statement, Justice Powell neatly summarized the balancing theory of the First Amendment. That is, the right of free expression under

the First Amendment was but one right among many, and when it came into conflict with another right, the two must be weighed and a decision made as to which should take priority. In the balancing process, competing social and human interests and values were to be considered on a case-by-case basis, resulting in the priority of one set of rights over another in each instance.[9] In attempting to balance the interests of the press and those of other groups in a free society, the courts have been asked to determine whether First Amendment rights are absolute over either a defendant's right to a fair trial or the government's right to investigate criminal behavior, administer criminal justice and protect the nation's security.

It must then be asked: Where do the First Amendment rights of journalists, as guardians of free speech, fit into this balance? How much weight should be given to the journalist's primary duty to provide information to the public and the tools he needs to fulfill this responsibility as opposed to the same journalist's obligation as a citizen to testify regarding criminal conduct he may have seen?

Are First Amendment rights "absolute," as some would contend? Do they hold a "preferred position" over all other provisions of the Bill of Rights?

The late Justice William O. Douglas was perhaps the greatest champion of the absolutist position that First Amendment rights stood above any balancing system and should never have to yield to other rights or interests:

> My belief is that all of the "balancing" was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment . . .[10]

Professor Alexander Meiklejohn was considered a leading exponent of the absolutist interpretation of the First Amendment:

> The primary purpose of the First Amendment is . . . that all citizens shall . . . understand the issues. . . . That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information may be kept from them.[11]

Justice Hugo Black was characterized as an absolutist but made an important distinction between speech and action that might well be applicable in a discussion of balancing theory and shield laws which extend beyond mere publication. Justice William Brennan mentioned this in a 1965 speech:

> Whatever theory of the First Amendment's scope is championed, all schools of thought . . . are in substantial agreement with Mr. Justice Black that the government has some power to regulate the "how" and "where" of the exercise of the freedom. . . . In other words, though the speech itself be under the First Amendment, the manner of its exercise or <u>its collateral aspects</u> may fall beyond the scope of the amendment. (Emphasis added)[12]

While reliance on an absolutist view of First Amendment supremacy could provide a comfortable cushion on which journalists could fall back, the reality has been that it has never been a particularly popular stance in this country. Even during the years of the liberal Warren Court, it was never espoused by the majority of its members. And recent decisions of the Burger Court have made it obvious that it will be decades before

even a tiny voice of absolutism will be heard again. Beginning with the ruling in the Branzburg-Caldwell-Pappas trilogy, which many journalists viewed as an omen of "worse to come"[13] and which will be dealt with in some detail below, the Court's recent decisions in Zurcher v. Stanford Daily,[14] Herbert v. Lando,[15] Gannett v. DePasquale,[16] and its refusal to review the lower court decision in New York Times v. Jascalevich[17] were clear demonstrations of the status of the absolutism of First Amendment rights as the nation entered its third century of existence.

Over the years, a number of different theories delineating the position of the First Amendment rights of free speech and press have been promulgated by constitutional lawyers and Supreme Court justices. Some of these will be outlined briefly below.

The "clear and present danger" doctrine was first put forth by Justice Oliver Wendell Homes in his opinion in Schenck v. U.S., in which he emphasized that First Amendment speech could be restricted only when circumstances were such as to "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[18] Justice Louis Brandeis later refined the doctrine in Whitney v. California,[19] in which Mrs. Whitney was convicted for being present at a Communist Party gathering, by maintaining that the courts and not the legislatures must determine whether the danger was immiment and emergency restraints were warranted.[20]

Under the "marketplace of ideas" theory, also promulgated by Justice Holmes, the free flow of ideas and information was essential for a democratic society in order to arrive at the truth. Only an immediate

danger could justify making any exceptions to the First Amendment, as he indicated in his dissent in Abrams v. U.S.[21]

In his majority opinion in Near v. Minnesota, Chief Justice Charles Evans Hughes outlined a "two-tiered theory" of the First Amendment: Speech and publication of matters related to political and social issues should be free and unrestrained; however, in certain circumstances, restraints were justified--that is, in matters of national security, incitements to riot or violence; and obscenity and libel.[22]

Political philosopher Meiklejohn was often classified as an absolutist, but on closer reading he seemed to interpret the First Amendment on a two-tiered basis similar to that of Hughes. He maintained that all speech needed by the people to carry out the self-governing process must be protected in order to assure "robust, uninhibited debate" on matters of public interest. He differentiated this from matters of private interest, which he considered Fifth Amendment freedoms that could be abridged in certain circumstances because they related to private and individual rights.[23]

As absolutists, Justices Douglas and Black advanced the "preferred position" argument that the First Amendment had primacy over other constitutional rights. In order to deny First Amendment protection, the government must bear the burden of proving its constitutionality. In a 1946 opinion, they wrote:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, . . . we remain mindful of the fact that the latter occupy a preferred position.[24]

Another view of First Amendment importance was the necessity for the press to carry out its role as the Fourth Estate or "watchdog" of the government in order to protect the people from those in power. In a 1974 address at the Yale Law School, Justice Potter Stewart noted that the primary purpose of a free press was to serve as a check on the three branches of the government. The press was given institutional status by its First Amendment protection and as such, must serve as an unofficial fourth branch of government in the scheme of checks and balances provided by the Constitution.[25]

Although these theories have come and gone as the times (and the composition of the Supreme Court) have changed, a striking similarity can be found underlying all of them: essentially, they all involved an element of ad hoc balancing, as discussed earlier in this paper (see pages 2-3, supra).[26]

It might be mentioned here that another form of balancing was presented by Professor Frank Strong as a corollary to the "clear and present danger" doctrine; that is, "definitional" balancing. Definitional balancing was similar to the "preferred position" theory in that it started with a heavy presumption in favor of First Amendment rights. It also affirmed the importance of preserving the rights of self-government, as expounded by Meiklejohn (see page 6, supra). Like these theories, definitional balancing regarded a First Amendment infringement as more serious than any infringement on the rights of an individual on the assumption that a threat to the First Amendment constituted a threat to free self-government. Though the scales were weighted in favor of the First Amendment, balancing of rights was still the basic element involved.[27]

Although definitional balancing never acquired much support for its application, the ad hoc balancing test seems to have become the most frequently employed theory in recent Supreme Court decisions involving the press.

One of the first expressions of this came from Justice Brandeis' concurring opinion in Whitney v. California, in which he emphasized:

> Although the rights of free speech . . . are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.[28]

Although this was regarded as an exposition of the "clear and present danger" doctrine, it certainly involved balancing the interests of national security against those of free speech, as did Justice Frankfurter's opinion in Dennis v. U.S.:

> The demands of free speech in a democratic society as well as the interest in national security are better served by . . . weighing of the competing interests. . . .[29]

One of the strongest advocates of balancing was Justice John M. Harlan. In Konigsberg v. State Bar, in which an applicant to practice law refused to respond to questions about Communist Party membership as a condition for licensing, Justice Harlan maintained that the state's right to protect itself from subversive influences outweighed First and Fourteenth Amendment protections:

> Whenever . . . these constitutional protections are asserted against the exercise of valid governmental powers, a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. . . .[30]

In 1963, Professor Thomas Emerson summarized ad hoc balancing thus:

> The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression.[31]

The balancing of a journalist's First Amendment right not to reveal sources of confidential information against a litigant's Sixth Amendment right to the testimony of witnesses against him did not become necessary until the late 1950s. In Garland v. Torre,[32] columnist Marie Torre had attributed unflattering statements about Judy Garland to an unnamed network executive. Torre's refusal to reveal her source was not based on the common law, as had been the practice until this time, but on First Amendment grounds. For the first time in recent history, a journalist was found guilty of contempt and jailed for refusal to testify. Justice Stewart, who was then judge of the Second Circuit Court of Appeals, agreed that freedom of the press might be hampered by forcing journalists to reveal their sources from time to time, but sometimes a determination must be made as to when such freedom may be curtailed in order to balance rights. He found that while freedom of the press was basic to a free society, so, too, was the right of the courts to discover the truth in order to achieve the fair administration of justice.[33] In this case, the latter outweighed First Amendment rights.

Since that time, numerous cases have required careful balancing of journalists' First Amendment rights against other protections afforded by the Constitution. A detailed accounting would probably find the ledger favoring First Amendment privileges, but recent anti-press decisions have

concerned journalists about the apparently eroding status of their First Amendment protections, leading many of them to seek an absolute privilege for themselves.

Protection of sources was considered to be a longstanding privilege, as evidenced by a 1971 study which found that in only four out of 80 cases were newsmen forced to reveal their sources.[34] In its role as the fourth estate, the press has served as "watchdog" for the people against those in power. Cognizant of the need to gather news from all sources in order to provide information to the public, journalists have maintained that the First Amendment afforded them a privilege against revealing their sources. They claimed that their ability to gather news would be seriously limited if they could no longer guarantee their sources' confidentiality. If reporters could be forced to reveal the identities of their sources, a general feeling of apprehension would cause these sources to dry up, and the public would be deprived of the information they would have otherwise supplied. As Justice Douglas explained in his dissent in the Branzburg case:

> A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify . . . his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended.[35]

Until recently, many journalists operated under the assumption that they did possess such a privilege. In discussing the Farber situation, which will be dealt with later in this paper, Theodore H. White said:

> Often there is no safe way to call attention to wrongdoing unless the protester is assured of his anonymity. . . . Everyone considers that the First Amendment guarantees protection of sources because it is essential to the newsgathering process for a free press.[36]

But the claim to this privilege is what has led the court, the law enforcers and the public into resenting the arrogance of the press, and many journalista have expressed doubt about the efficacy of being granted such status.

Lapham feared that seeking this privilege would turn the First Amendment into a sacred cow:

> In the name of freedom of the press, it /advocacy of an absolute shield/ stands willing to abandon honesty, rigorous inquiry, . . . protections of the Fifth and Sixth Amendments, and mechanisms of law.[37]

Vermont Royster, former editor of the Wall Street Journal, held that the press should guard its role as the fourth estate in the system of checks and balances but should be wary of

> claiming . . . any exemptions from the obligations of all citizens, including the obligation to bear witness in our courts once due process has been observed. . . . There is nothing in our First Amendment that makes us a privileged class apart.[38]

In his survey of newsmen in 1970, Vince Blasi, professor of law at the University of Michigan, found that most of them felt ethical obligations to their sources, but they also had a strong sense of civic responsibility. However, Blasi found that the majority of journalists preferred to determine for themselves when the civic need for information outweighed their professional need to maintain confidences.[39]

It should be remembered that citizens do not have the opportunity to determine for themselves whether or not to testify when called by a grand jury. However, Justice Douglas, in his dissent in Branzburg, stated:

> The press has a preferred position in our constitutional scheme, . . . not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know.[40]

Justice Douglas' statement goes to the heart of the matter: Is it necessary for the press to occupy a "preferred position" in order to bring truth to the public? How can a journalist be accorded a "preferred position" and yet not be "set apart as a favored class"? Without granting of absolute privilege, how could newsmen manage to avoid their obligations as citizens to testify regarding criminal conduct? Or is it arrogant for journalists to assert First Amendment protections in order to avoid revealing their sources?

After a period of basking in the public glories of post-Watergate adoration, in the past few years it has seemed as if somewhere a journalist is always being threatened or actually imprisoned for refusal to testify before a grand jury or otherwise cooperate with the demands of the legal community.[41] Is it true, then, that journalists have been subjected to more governmental harassment and restrictions than ever before? The verdict, most likely, would be: guilty, but with an explanation.

In the past, reporters often cooperated with law enforcement officials and the courts by providing assistance in gathering evidence. The image of friendly competition between the press and law officers was reinforced by fictionalized accounts of the reporter's resourcefulness,

perseverance and courage in uncovering the facts with the goal of punishing the guilty and protecting the innocent. As Superman, mild-mannered reporter Clark Kent, with his journalistic colleague Lois Lane at his side, apprehended criminals and triumphantly turned them over to the police for the administration of justice.

However, recent events have made the press less enthusiastic about cooperating with a government that was found to have been involved in civil rights violations, spying on its own citizens, causing a war for questionable ends and fostering presidential manipulations and deceptions. Some critics maintained that in reporting many of these activities, the press was able to gain access that no one else had and, as a result, often became a participant rather than an impartial observer. While there has been some disagreement as to whether latter-day reporters' techniques and approaches differ from those of their predecessors, it usually has been agreed that an individual journalist's success was based largely on very subjective, intuitive personal qualities in dealing with sources to gain their confidence.[42] The difference is that in the last few years, journalists have been less willing to share these confidences with law enforcement officials, grand juries or even defendants who might benefit from them. In retaliation for this reluctance, journalists have been awarded contempt citations, jail sentences and large fines. To a certain portion of the public and the government, journalists' attempts to protect their sources have been construed as the arrogance of the press, an attitude that journalists somehow felt they stood above the law.

In June 1972, in its first--and, as it later turned out, only--ruling on the issue, the Supreme Court decided in the Branzburg case that three journalists who had refused to respond to grand jury subpoenas had no First Amendment protections to avoid doing so.

Paul Branzburg, a reporter for the Louisville Courier-Journal, had written an article describing his observation of two persons synthesizing hashish from marijuana and was subpoenaed by a grand jury to identify the two hashish makers. Earl Caldwell, a black reporter for the New York Times bureau in San Francisco, had gained the confidence of Black Panther Party leaders and was able to spend a considerable amount of time with them. He, too, was subpoenaed to appear before a grand jury and to bring with him all his notes and tapes of interviews with Black Panther leaders. Paul Pappas, a television reporter in New Bedford, Massachusetts, had visited the headquarters of the Black Panthers during a civil disturbance and was called to testify about what he had seen while inside the building. All three refused to testify about criminal activities they may have witnessed, claiming First Amendment privilege to protect confidential sources and information; thus, all three were cited for contempt. It must be emphasized that Branzburg was denied protection under the Kentucky shield law, and Massachusetts had no shield law to offer protection to Pappas. Only Caldwell received protection from the lower courts, with the Ninth Circuit Court of Appeals maintaining that the First Amendment did provide a qualified privilege to newsmen; in addition, the court found no compelling reasons for requiring his testimony and pointed out that the breadth of materials requested indicated a "fishing expedition" type of inquiry.[43]

Writing for the majority, Justice Byron White maintained that since the Court was not convinced of the claim that to gather news was a First Amendment right, the "burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information."[44] He continued:

> The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.[45]

In his dissent, Justice Stewart succinctly reiterated guidelines for the government to use in determining whether the subpoenaing of a reporter was justified: (1) The information must be clearly relevant to a specific violation of law; (2) All other alternative sources for the information must have been exhausted; and (3) The information must be of overriding and compelling interest--that is, it must go to the heart of the matter.[46]

The Supreme Court handed down the Branzburg decision on the same day it ruled against capital punishment. Thus, public discussion of Branzburg's implications was lost in the controversy over the abolition of the death penalty.[47] But those within the journalism field had dire predictions of its effects: News sources would dry up; the atmosphere would be poisoned; and reporters would be unduly burdened in their news gathering efforts since no one would feel safe in confiding in them. To support these claims, they cited Justice Stewart's dissent:

> After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. . . . The reporter must speculate about whether contact with a controversial source . . . will lead to a subpoena.[48]

One former editor declared that Justice White's opinion "sliced the idea of a newsman's privilege into bloody strips,"[49] and the same editor urged the passage of a federal immunity law as the only solution to protect journalists. Since the narrow perspective of the publishing world provided most of the response to Branzburg, these views could be attacked as somewhat hysterical overreactions. Indeed, within a few months after the decision, several lower courts upheld a qualified privilege for newsmen. For example:

In Baker v. F & F Investment Co., journalist Alfred Balk wrote an article about blockbusting in Chicago. In an action filed against a real estate firm for discrimination, Balk was called as a witness but refused to reveal his sources. The Court of Appeals found that none of the criteria for denying qualified privilege were met, and Balk's First Amendment privileges outweighed the need to testify:

> While we recognize that there are cases where First Amendment rights must yield, we are still mindful of the preferred position of the First Amendment. . . . Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances . . . in which the public interest in nondisclosure of a journalist's confidential sources outweighs the public and the private interest in compelled testimony.[50]

In Democratic National Committee v. McCord,[51] Judge Charles Richey quashed the subpoenas of a number of newsmen because there was no showing that the defendant had exhausted all alternative sources of information or even that the documents sought were relevant, thus striking the balance between freedom of the press and the obligation to give testimony as recommended by Justice Powell.

But journalist's privilege did not always win out in the balancing of one set of rights against another. In State v. Knops, the Wisconsin Supreme Court denied privilege to underground newspaper editor Mark Knops who refused to provide information that could lead to those responsible for the bombing of a University of Wisconsin building in which a student was killed. Knops' claim of privilege was differentiated from that of Caldwell in that he had been requested to answer specific questions rather than subjected to a general inquiry. Citing the Caldwell standard, the Wisconsin court said:

> The need for the answers is "overriding" to say the least . . . and is nothing short of the public's need (and right) to protect itself from physical attack by apprehending the perpetrators of such attacks.
>
> * * * * *
>
> A weighing of competing values is involved here, . . . and the appellant is compelled to disclose the information sought.[52]

In Carey v. Hume, Britt Hume, an assistant to columnist Jack Anderson, reported on alleged criminal conduct by union official Edward L. Carey, who then filed a libel suit against him. Hume refused to reveal the source who had purportedly given him an eyewitness account of Carey's actions, but Carey had no other way to identify the source, which was highly relevant to his case. The judge ruled that the newsman's interest in protecting his sources was outweighed by the plaintiff's interest in defending his reputation.[53]

In the ensuing years, the books have been filled with cases swinging the pendulum back and forth between First Amendment protection and the rights provided by the Fifth, Sixth and Fourteenth Amendments. The variety of rulings in these cases have demonstrated that the ad hoc balancing theory

was not without its failings. While the attempt to balance rights appeared to be a reasonable approach in a society where traditional values and firm rules had fallen by the wayside, the determination on a case-by-case basis of whose rights carried greater weight has caused great uncertainty as to how a particular judge will weigh those rights.

In his analysis of Justice Powell's Branzburg opinion, Professor Benno C. Schmidt Jr. perceived it as saying that the particular facts and circumstances in each case--from the grand jury to the journalist to the source, and even to the crime itself--must be gauged on their merits; that is, by ad hoc balancing.[54]

The term, "ad hoc," meant that the balancing process was to be applied only to the particular case at hand; there was no guarantee that the decision in the next case involving apparently similar circumstances would necessarily follow suit. Since American jurisprudence is supposedly based on stare decisis, or precedent, the anomaly of ad hoc balancing has had the effect of putting all parties in a state of limbo until the court ruled on the matter. To be forced to operate under such a cloud of uncertainty would put serious constraints on anyone, no matter what his or her position; but the obstacles become more evident in regard to the duties of the journalist who required freedom to gather news wherever he could find it and the source who might have taken some risks in talking to the reporter.

Justice White was aware of the problems that would ensue if the conditional privilege advocated by Caldwell--briefly, that the government must demonstrate (1) relevance, (2) exhaustion of all other sources and (3) compelling interest--were granted: it would be unpredictable as to

when and in what circumstances it would be validly invoked. If sources were as apprehensive about having their identities revealed as reporters claimed they were, leaving it up to the judge of a particular court to determine whether these criteria were met would seem to be just as inhibiting to the news gathering process as having no protection at all.[55]

Thus, it would appear that journalists' pleas for a qualified or conditional shield would not really provide them the latitude they claimed they needed to fulfill their First Amendment responsibilities, and that only an absolute shield would suffice--a very unrealistic expectation, given the Supreme Court's current composition.

This pessimistic outlook--if one viewed it as pessimistic--was confirmed by a case that initially had journalists cheering but the consequences of which could offer them little comfort in seeking an absolute privilege under the First Amendment. The case was the notorious U.S. v. Nixon, in which the former President was denied immunity from producing his White House tapes in response to a grand jury subpoena. After being convinced that the tapes were necessary evidence, the law-and-order Supreme Court he had appointed ruled in an 8-0 decision that the President's claims of executive privilege were outweighed by the fair administration of justice, and that to allow such privilege "to withhold evidence that is demonstrably relevant . . . would cut deeply into the guarantee of due process . . ."[56] If privilege was thus denied to the President of the United States, it would be impossible to conceive of its being granted to journalists, at least in the foreseeable future.

But the majority opinion in Branzburg did seem to encourage the framing of at least a qualified shield law by the states or Congress. Justice White advised that Congress could "determine whether a statutory newsman's privilege is necessary and desirable," and state legislatures were "free to fashion their own standards in light of the conditions and problems . . . in their own areas."[57] The Attorney General's 1970 guidelines for federal officials in dealing with the press were cited as models to be considered in framing such legislation and are briefly summarized as follows:

> 1. In requesting subpoenas, the effect of limiting First Amendment rights must be weighed against the public interest to be served by the fair administration of justice.
>
> 2. Every effort should be made to obtain the information from non-press sources first.
>
> 3. Negotiations with the medium involved should be attempted prior to the issuance of a subpoena.
>
> 4. The attorney general must personally authorize any action leading to a subpoena.
>
> 5. In granting such authorization, the following principles apply: the information sought must be essential and not obtainable elsewhere, limited to verification of published information under ordinary circumstances; if not, then great caution must be observed when seeking unpublished information or when a claim to confidentiality is made. (Emphasis added)[58]

Although the Branzburg decision inspired a number of states to enact shield laws for journalists, the ensuing years have demonstrated that when such laws must be relied on, they often were of little value. The state of New Jersey, for example, followed the Supreme Court's suggestions in enacting a shield law, a law which later failed to protect

Peter Bridge[59] or Myron Farber.[60] And Congress, which considered a possible federal shield law for several years after hearing testimony from all facets of the journalism and legal professions, was not able to formulate a law sufficient to get out of committee and abandoned the task, at least for the present.

Even in light of the somewhat inconclusive value of shield laws, many maintained that the constitutional privilege was not strong enough and that statutory shield laws should be enacted. As one professor noted, shield laws "are probably better than nothing, but not much better . . ."[61]

On initial reading, a typical shield law would appear to be quite obvious in its scope and intent. For example, the Ohio shield law, Section 2739.12 Ohio Revised Code, provides as follows:

> No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof.

However, on closer analysis, it has been found that most state shield laws contain loopholes through which the courts could force disclosure when they felt it necessary. As will be discussed below in the Farr[62] case, the California law provided protection only when the judicial process was not threatened. Louisiana's law may be revoked if a judge

found it necessary to "prevent injustice." Other states permit disclosure if all other sources have been exhausted. Questions have also arisen in various states as to whether the privilege was limited to the source only or extended to published information or to unpublished information as well.[63] These inconsistencies in the law have proven "fatal" to some journalists who had assumed they were covered by shield laws only to find they were denied protection when they needed it most. Furthermore, they were denied these protections by the ad hoc balancing of rights in which courts found that other rights outweighed the journalists' claims of protection under the statutes.

In New York Times v. Jascalevich, Times reporter Myron Farber's protection under the New Jersey shield law seemed obvious when he refused to turn over confidential files to the trial judge in a murder case. Yet, before the judge would rule on whether Farber could assert the privilege provided in the law, he demanded to examine Farber's papers in camera. As has now become commonly known, Farber refused and ultimately served 40 days for contempt, and the Times paid $285,000 in fines. In upholding the convictions, the New Jersey Supreme Court invoked the Sixth Amendment rights of the accused to have "compulsory process for obtaining witnesses in his favor." The New Jersey court maintained that where Sixth Amendment provisions and a statute collided, it was "unassailable" that the statute must yield. Since the petition of Farber and the Times was denied certiorari, the United States Supreme Court presumably supported this reasoning[64] as being in accordance with Justice Powell's theory of "striking a proper balance among rights."

In 1970, William Farr, a reporter for the Los Angeles Herald-Examiner covering the trial of Charles Manson and his followers, received a copy of a statement indicating that one of the defendants had confessed to the crimes. He was allegedly given this statement by one of the trial attorneys, all of whom had been placed under a restrictive order not to release trial testimony. When Farr was requested to reveal his source, he refused, citing the California shield law. However, to demonstrate the lengths to which courts can go, the judge said that Farr no longer qualified under the shield law because by the time his hearing on the matter was held, he had left the newspaper and was working as a press aide to the district attorney. On appeal, Farr's status as a working journalist was acknowledged, but the shield law was still held inapplicable because it interfered with the court's power to enforce its edicts and control the conduct of participants at a trial. As another example of ad hoc balancing, the court continued:

> To construe the statute as granting immunity to petitioner . . . would be to countenance an unconstitutional interference by the legislative branch with an inherent and vital power of the court . . . [65]

In other words, the legislature had no business making a law which would usurp the court's powers to conduct its proceedings as it saw fit. Under this interpretation, it would seem that formulating shield laws would be a vain effort since their purpose would be to regulate the conduct of the journalist vis-a-vis the courts.

In a number of cases, shield laws were circumvented by contentions that the reporter himself was the source, and as such, his testimony was not entitled to protection. For example, in Lightman v. State,[66] a reporter

in Maryland (home of the first state shield law, enacted in 1896) who wrote about being offered a joint of marijuana by a store clerk was ordered to testify before a grand jury. In People v. Dan, TV reporter Stewart Dan was required to reveal before a grand jury what he had seen while inside Attica prison during the 1972 riots there. In this case, the court maintained that a shield law could protect news sources but not reporters who were themselves witnesses to crimes. And, of course, Messrs. Branzburg and Caldwell were denied protection under their respective states' shield laws on the same rationale. Pappas, who was not protected by a state shield law, received the same disposition of his case from the Supreme Court as Branzburg and Caldwell--further evidence that, in the final analysis, having a shield law to rely on made no difference. Cases such as these demonstrate the application of the ad hoc balancing theory by the courts, with the rights of journalists being outweighed by other constitutional considerations when it came to witnessing crimes.

Even a model law recommended by the Society for Professional Journalists/Sigma Delta Chi in 1971 was not much different than the various state-enacted shield laws. It offered only a qualified privilege and contained many of the same loopholes previously mentioned (see pages 21-22, supra).[67]

Therefore, such laws appear to have limited value, and serious consideration should be given to the advisability of pressing for such legislation. However, from time to time in the balancing of journalists' rights against those of others, shield laws have provided some protection. For example:

In Spiva v. Francouer, a Florida state court quashed a subpoena against the Miami News in which defendants sought confidential materials used by the newspaper to editorialize against them. The court held that enforcement of such a subpoena would have a "chilling effect" on freedom of the press and could cause news sources to dry up.[68]

In Wisconsin, a murder defendant's subpoena against an underground newspaper reporter's unpublished notes was quashed on the finding that there was "no compelling public concern in the information sought."[69]

Although it has appeared that shield laws may have provided limited protection to journalists in some cases, on closer analysis, it could be found that it was the First Amendment or other mitigating circumstances that provided the real basis for granting immunity. Thus, with the limited value of state-enacted qualified shield laws, it could be concluded that the solution is one of all or nothing: reporters should either be covered by an absolute shield or have no law but the First Amendment on which to rely.

In seeking an absolute privilege, the primary problem would be whether newsmen could qualify for this immunity. As every journalist should know, under the common law, absolute privilege was limited to specific relationships: doctor/patient, lawyer/client, priest/penitent, husband/wife (although the Supreme Court decision of February 1980 has made some changes in the husband/wife privilege), and legislators in floor debates. However, some have assumed that journalists were included in this group:

> For some of us--doctors, lawyers, clergymen, and journalists--it is an article of faith that we must keep confidential those matters entrusted to us . . . (Emphasis added)[70]

What has not been made clear is that in all of these relationships, the privilege belongs to the speaker, not the listener. It is the patient, the client, the penitent, the spouse, who is protected by the privilege. In a journalist/source relationship, the speaker is the source, so it would be the source who has the privilege. This could lead to several interesting implications:

1. The source, as an ordinary citizen, is not entitled to any special privilege. By talking to a reporter, can a source suddenly acquire a privileged status? Experienced journalists are well aware that those who confide in them have an interest in disseminating information. Thus, by seeking absolute immunity for their sources, journalists could jeopardize their own credibility should the sources abuse their newly acquired privilege.

2. Under absolute privilege, the listener cannot testify unless the speaker should decide to waive this privilege and allow the listener to do so. However, in their quest for protection, journalists seek the option to testify. If, while granted absolute privilege, journalists would still have an option to testify, that would certainly set them apart as a special class--something even Justice Douglas said he did not want to see (page 12, supra).

3. Under absolute privilege, the free flow of information is necessary to preserve the sanctity of a larger relationship with the aim of achieving some higher purpose--e.g., health, justice, forgiveness, marital harmony and understanding. But when a source talks to a reporter,

it is solely for the purpose of publishing the information. The communication is not incidental to the relationship; it is the substance of the relationship.

4. Under the judicial system, the court determines the status of every participant in a legal proceeding. However, by choosing to invoke privilege on the basis of his being in the business of gathering news, the journalist seems to feel he can determine his own status with the court.

5. Reporters have been reluctant to testify in recent years on the theory that they do not want to be instruments of the government. Yet, couldn't journalists be regarded as agents of their sources by the very nature of this clandestine relationship?

6. In the other privileged relationships, the parties are known, but the information is not. In the journalist/source relationship, the information is known, but one of the parties--a significant piece of the relationship--is not. Going back to early First Amendment theory, it is the responsibility of the press to supply the public with all the information needed to carry out self-government. The identity of the source of this information is a vital ingredient in assisting the public in making an informed assessment of its accuracy. Are journalists willing to sacrifice this basic tool used in fulfilling their professional responsibilities?

In formulating a claim for absolute privilege, several journalistic inconsistencies come to light. The journalist exalts his role in bringing truth and information to the public, yet by hiding his sources, either by

veiled attributions or actual secrecy, he is omitting a very important factor in his story. Said newsman Jerry Chaney:

> Being told who supplied the information could be as important as what the informant had to say. Knowing the source affects credibility, both as to the source's qualifications for giving the information and as to possible bias.[71]

A good reporter may also question whether a source who fears exposure is really a reliable source. As noted, a journalist should constantly remember that persons talking to him know he is in the publication business. Those who speak for publication usually have their own reasons for wanting the information known; thus, the reporter should make sure he is not being compromised into acting as agent for the source.

Indeed, whether the source is within or outside the government, journalists must constantly be on guard to protect their own credibility. Although many would vehemently disagree, according to critic Tom Bethell, the concept of an adversary relationship between the press and the government may have already been compromised. By developing confidential relationships with governmental officials and cooperating with them in publishing calculated leaks under the security of First Amendment protection, the Washington press may have abdicated its watchdog role in its desire to become a "partner in power" with the government in formulating national policy. Bethell insisted that even Watergate, considered the epitome of a press-government confrontation, was, in reality, a case of the press' taking sides in a war between one part of the government and another.[72]

Thus, in order to fulfill his responsibility to provide the public with information by which to make informed judgments, shouldn't a reporter

question the motives or veracity of a source who is not willing to stand by his own testimony? It has been suggested that a source who demands confidentiality be offered the option of being identified or going unpublished. In most cases, the source would opt for the former and not suffer any injury either to himself or to innocent persons because of it.[73]

The journalist also sees his role as serving the public interest by "exposing the bad guys, calling attention to wrongdoing, putting pressure on law enforcement officials to do their duty," in order to insure that justice is done. However, if "journalists agree that guilt or innocence can best be established when maximum information is available," it may be asked:

> . . . why should a journalist object to providing information which would shed light on the guilt or innocence of a person so that justice can be served? Why should he refuse to testify before a grand jury? If he has tapes or notes not otherwise available to the court, shouldn't he be willing to divulge them in the interest of furthering justice?[74]

Dilemmas such as these reinforce the accusations of "arrogant" and "overly powerful" against the press. Other problems indicating an ambivalent attitude toward the press are reflected in questions such as: When journalists plead for the necessity of confidentiality, how sensitive was the press about the confidentiality of the Pentagon Papers? And what about those who may be publicly accused or damaged by a secret source's statements? What happened to the constitutional right of a defendant to confront his accuser?[75]

Although the issue of protecting sources has gained widespread attention recently through a few dramatic cases, it should be remembered

that the majority of reliable reporters use common sense in their day-to-day activities, and most journalist/source relationships are not characterized by the sort of turmoil discussed herein. According to Blasi's research,[76] good reporters use confidential sources only for verification and general assessment of information rather than primary newsworthy material.

Experienced reporters have learned not to promise confidentiality. Clark Mollenhoff, a longtime investigative reporter for the Des Moines Register, advised young journalists not to offer assurances of confidentiality in view of the possible risks involved to themselves and their employers. He also warned that unless they were willing to go to jail, there may be times when they will be required to give testimony or provide material.[77]

On a pragmatic level, if neither an absolute privilege nor a qualified state-enacted shield law can offer adequate protection to journalists, it may be suggested that a federal shield law would provide a solution. Although several unsuccessful attempts at this were made during the last decade, if the present judicial anti-press attitude continues, the temptation would be great for journalists to revive efforts to pass a federal shield law. However, before doing so, they would do well to consider the frightening consequences of such an act:

First, in order to pass a law protecting journalists, they would have to be identified as a class. This is something that all newspersons should fear--and rightly so. Even Justice White recognized this as a problem in his Branzburg opinion.[78] Who would qualify as a reporter? Would the pamphleteer in his basement be accorded the same status as the

editor of the Washington Post? It has been said that I. F. Stone, one of the most highly respected investigative journalists of modern times, was denied a White House press pass because he did not represent any newspaper; he only wrote, edited and published his own weekly newsletter! Couldn't this attitude be extended to apply a narrow definition of journalists, thus limiting the right of free expression to a chosen few?

Second, if the privilege were to be granted by the government, wouldn't it also assume the responsibility for regulating this privilege or even deciding to remove it? Such a prospect would make the framers of the Bill of Rights turn over in their graves! As an example of what could happen, during Congressional hearings on immunity, one senator actually suggested that immunity be granted under two conditions: (1) amend the libel laws to preclude public figures from having to prove actual malice; and (2) establish a "Truth in News Commission" to force the media to correct their errors![79]

Third, under absolute privilege, most of the relationships are professional and contractual ones. Although journalists often regard themselves as professionals, the term usually implies a specified amount or type of education or training and authorized licensing procedures. Such restraints on journalists would, of course, fly in the face of the First Amendment!

In conclusion, in attempting to solve the problems of journalist/source relationships, it has been shown that:

1. State shield laws are virtually ineffective.

2. Absolute privilege is both an unrealistic possibility at this time and could endanger the journalist's role.

3. A federal shield law could place more restrictions and controls on journalists than are acceptable; for example, licensing requirements.

Therefore, the journalist is left with only the First Amendment privileges provided in the United States Constitution on which to rely--which is not such a bad idea, after all.

James H. Bort Jr., former city editor of the Fresno Bee, was one of four journalists jailed for contempt after refusal to name sources who revealed secret grand jury testimony. The "Fresno Four's" imprisonment followed one and one-half years of litigation until certiorari was denied by the U. S. Supreme Court. After the experience, Bort advised:

> The American press must therefore defend the First Amendment with all its energy, even if it means an occasional jail sentence. . . .
>
> Legislated protection of the confidential relationship between reporters and their sources is ineffective. California's shield law . . . is a clear strong statement that journalists "cannot be adjudged in contempt for refusing to disclose the source of any information procured for publication." Yet the Fresno Four and Farr were jailed under it in recent years for relying on it.
>
> We in the press must hang our hats on the First Amendment. (Emphasis added)[80]

William Rusher, publisher of the National Review, expressed agreement with the Branzburg decision, saying that notwithstanding his First Amendment responsibilities, a journalist also had duties as a citizen under the Sixth Amendment to answer subpoenas, give testimony or otherwise reveal evidence about a crime he may have witnessed. He maintained that the Branzburg decision assured that the First Amendment required courts to

protect newsmen from unnecessary harassment--i.e., unnecessary demands for exposure of their sources.[81] Using ad hoc balancing, the courts have been entrusted with weighing the demands against journalists against those of other constitutional provisions.

Rusher also opposed enactment of a federal shield law out of fear that

> . . . what Congress can give, it can also take away, a dangerous precedent to press freedom. I . . . suggest that we stick by the First Amendment. . . . It has, for two centuries, provided this country with one of the freest presses in the world. It can do so for another two centuries without the help of Congress.[82]

In a 1974 editorial, the Washington Post opposed the legislation of any kind of shield or privilege, arguing that the "best shield is the First Amendment, without the supposed reinforcement of even the purest form of shield law." (Emphasis added)[83]

A final note. If journalists do not seek protection under either an absolute or qualified shield, legislated at either the federal or state level, and are willing to take their chances as ordinary citizens, they should at least be afforded the same rights as other United States citizens. In the Times v. Jascalevich case, Myron Farber never had a hearing! James Goodale, vice chairman of the New York Times Co., pointed to this outrage, arguing:

> While reasonable men may disagree as to the precise nature of the journalist's privilege . . . everyone would agree that reporters are entitled to a hearing before being shipped off to jail . . .[84]

While Farber may have ended up in jail even if he had had a hearing, the option to take such a risk may still be the best solution. Considering

the alternative--government's making laws to protect, and perhaps eventually to control--the press, wouldn't the journalist be better off to have his First Amendment rights balanced and weighed rather than hide under the paternalistic protection of federal or state legislation with all the restrictions that such protection could lead to?

NOTES

[1]William E. Francois, Mass Media Law and Regulation (Columbus, Ohio: Grid, Inc., 1978), p. 358, note 1.

[2]Lewis H. Lapham, "The Temptation of a Sacred Cow," Harper's, August 1973, p. 43.

[3]408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

[4]Ibid.

[5]Ibid.

[6]33 L.Ed.2d at 655-56.

[7]Ibid., at 676.

[8]Ibid., at 656.

[9]Don R. Pember, Mass Media Law (Dubuque, Iowa: William C. Brown Company, 1978), p. 53.

[10]33 L.Ed.2d at 658.

[11]Alexander Meiklejohn, Free Speech and its Relation to Self-Government (New York: Harper & Bros., 1948), pp. 88-89.

[12]William Brennan, "The Supreme Court of the Meiklejohn Interpretation of the First Amendment," 79 Harvard Law Review 1, November 1965, p. 5.

[13]Norman E. Isaacs, "There may be worse to come from this Court," Columbia Journalism Review, Sept./Oct. 1972, p. 21.

[14]436 U.S. 547 (1978).

[15]568 F.2d 974, 99 S.Ct. 296 (1979).

[16]372 N.E.2d 544, 99 S.Ct. 2898 (1979).

[17]98 S.Ct. 3058 (1978).

[18]249 U.S. 47, 52, 39 S.Ct. 247, 249 (1919).

[19]274 U.S. 357, 47 S.Ct. 641 (1927).

[20]Ibid., as cited in Francois, op. cit., p. 26.

[21]250 U.S. 616, 40 S.Ct. 17 (1919).

[22]283 U.S. 697, 716, 51 S.Ct. 625 (1931).

[23]Brennan, op. cit., p. 12.

[24]Marsh v. Alabama, 326 U.S. 501, 509, 66 S.Ct. 276, 280 (1946).

[25]Potter Stewart, Address at Yale Law School Sesquicentennial Convocation, November 2, 1974.

[26]Francois, op. cit., p. 27.

[27]Donald M. Gillmor and Jerome A. Barron, Mass Communication Law (St. Paul, Minn.: West Publishing Co., 1979), p. 86.

[28]Ibid., note 20, at 373, as cited in "The Speech and Press Clause of the First Amendment as Ordinary Language," 79 Harvard Law Review, December 1973, p. 376.

[29]Ibid., at 377.

[30]366 U.S. 36, 50 (1961).

[31]Thomas Emerson, "Toward a General Theory of the First Amendment," 72 Yale Law Journal 877, 912 (1963).

[32]259 F.2d 545 (2d Cir. 1958), cert. den. 358 U.S. 910, 79 S.Ct. 237 (1958).

[33]Francois, op. cit., p. 328.

[34]Ibid., at 321.

[35]33 L.Ed.2d at 664.

[36]Theodore H. White, "Why the Jailing of Farber Terrifies Me," New York Times Magazine, November 26, 1978, p. 70.

[37]Lapham, op. cit., p. 46.

[38]Vermont Royster, "On the Freedom and Responsibility of the Press, Policy Review, Summer 1979, p. 6.

[39]Vince Blasi, "The Newsman's Privilege: An Empirical Study," 70 Michigan Law Review, 229, 267 (1971).

[40]33 L.Ed.2d at 663.

[41]Sidney Zion, "High Court vs. The Press," New York Times Magazine, November 18, 1979, p. 145.

[42]Blasi, op. cit., p. 235.

[43]33 L.Ed.2d at 638.

[44]Ibid., at 639.

[45]Ibid., at 645.

[46]Ibid., at 676.

[47]Isaacs, op. cit., pp. 21-23.

[48]33 L.Ed.2d at 669.

[49]Isaacs, op. cit., p. 20.

[50]470 F.2d 778 (2d Cir. 1972), cert. den. 411 U.S. 966 (1973).

[51]356 F.Supp. 1394 (D.C.D.C. 1973).

[52]183 N.W.2d 93, 49 Wis.2d 647 (1971).

[53]492 F.2d 631 (1974).

[54]Benno C. Schmidt Jr., "The decision is tentative," Columbia Journalism Review, Sept./Oct. 1972, pp. 29-30.

[55]33 L.Ed.2d at 651-53.

[56]418 U.S. 683, 94 S.Ct. 3090, 3095-96 (1974).

[57]33 L.Ed.2d at 654.

[58]Francois, op. cit., p. 319.

[59]In re Bridge, 120 N.J.Super. 460, 295 A.2d 3 (1972).

[60]New York Times Co. v. Jascalevich, op. cit., note 17.

[61]Pember, op. cit., p. 307.

[62]Farr v. Superior Court, 22 Cal. App.3d 60, 99 Cal. Rptr. 342, cert. den. 409 U.S. 1011 (1972).

[63]Francois, op. cit., p. 324-25.

[64]Zion, op. cit., p. 144.

[65]Pember, op. cit., p. 307.

[66]15 Md.App. 713, 294 A.2d 149 (1972).

[67]Francois, op. cit., p. 325.

[68]39 Fla. Supp. 49 (1973).

[69]Zelenka v. Wisconsin, No. 76-145-CR (1978), "Dope Source is Protected," The News Media and the Law, Oct. 1978, p. 9.

[70]Daniel Schorr, Testimony before House Ethics Committee, September 15, 1976.

[71]Jerry Chaney, "Level with us, just how sacred it your source?" The Quill, March 1979, p. 28.

[72]Tom Bethell, "The Myth of an Adversary Press," Harper's, January 1977, p. 36.

[73]Chaney, op. cit.

[74]Ronald Hicks, "The Editor and Aristotle," The Quill, October 1979, pp. 24-25.

[75]Ibid.

[76]Blasi, op. cit., p. 287.

[77]Clark R. Mollenhoff, "You'd better know what you're getting into," The Quill, March 1979, p. 27.

[78]33 L.Ed.2d at 653.

[79]Lapham, op. cit., p. 58.

[80]Rosato v. Superior Court, 51 Cal.App.3d 190, 124 Cal.Rptr. 427 (1975), as cited in "Go to Jail at 9 a.m.," The Press and the Law, (New York: Overseas Press Club of America, 1977), p. 24.

[81]Francois, op. cit., p. 335.

[82]Ibid. at 336.

[83]Marc A. Franklin, The First Amendment and the Fourth Estate (Mineola, N.Y.: The Foundation Press, Inc., 1977), p. 144.

[84]James Goodale, "Reporters Have Rights, Too," The Nation, November 3, 1979, p. 3.